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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JOEL KRIEGER, Individually and on Behalf
of All Others Similarly Situated,

Plaintiff,

vs.

ATHEROS COMMUNICATIONS, INC.,
DR. WILLY C. SHIH, DR. TERESA H.
MENG, DR. CRAIG H. BARRATT,
ANDREW S. RAPPAPORT, DAN A.
ARTUSI, CHARLES E. HARRIS,
MARSHALL L. MOHR, CHRISTINE
KING, QUALCOMM INCORPORATED,
and T MERGER SUB, INC.,

Defendants.

Case Number 5:11-cv-00640-LHK (HRL)

CLASS ACTION

**PARTIES' JOINT STATEMENT
PROVIDING CLARIFICATION
REGARDING FILING OF
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

[Filed pursuant to an Order of the Court
dated June 10, 2011]

Judge: Hon. Lucy H. Koh
Ct: #4, 5th Floor
Date Action Filed: February 10, 2011

Pursuant to the Court's Order dated June 10, 2011, the parties respectfully submit their "Joint Statement Providing Clarification Regarding Filing of Plaintiff's First Amended Complaint" (the "Statement").

I. Statement of Plaintiff Joel Krieger

Plaintiff Joel Krieger ("Plaintiff") filed this action on February 10, 2011. Shortly thereafter, Plaintiff filed his "Motion for Preliminary Injunction and Expedited Discovery." *See* Docket Entry ##6-10. After Plaintiff's motion was briefed and argued, the Court entered its Order on March 4, 2011, "Staying State Law Claims; Denying Motion for Preliminary Injunction." *See* Docket Entry #33.

Thereafter, the parties met and conferred and on March 10, 2011, agreed that defendants may have up to April 11, 2011, to answer or otherwise respond to Plaintiff's complaint (Docket Entry #34) which was ordered by the Court the following day. *See* Docket Entry #35. After defendants filed their motion to dismiss, Plaintiff indicated his intent to amend his complaint which defendants knew would include a class claim under Section 14(a) of the Exchange Act based on previous discussions, including settlement discussions, between counsel for Plaintiff, Mr. Juan E. Monteverde, and counsel for defendants, Mr. David Furbush, in March and April 2011.

In fact, approximately one week later on April 19, 2011, the parties submitted a "Stipulation and [Proposed] Order Regarding Stay of Discovery, Case Management and ADR Headlines" which specifically stated and disclosed to the Court Plaintiff's intent to amend his complaint. *See* Docket Entry #40, page 2 (stating "WHEREAS, Plaintiff intends to amend the federal claims alleged in his complaint[.]"). *See also id.* at 3 ("WHEREAS, in light of the Atheros Defendants' pending motion to dismiss and Plaintiffs' intention to amend their federal securities law claims in the complaint, the parties wish to continue the Case Management Deadlines until after such time as an amended complaint is filed...").¹

Finally, prior to filing Plaintiff's "Administrative Motion to File Under Seal Plaintiff's Amended Complaint and Exhibit A Thereto," Plaintiff circulated a draft of his motion to counsel for

¹ The stipulation was ordered by the Court on April 22, 2011. *See* Docket Entry #41.

1 defendants for their review. Additionally, Mr. Monteverde told counsel for Defendants, Ranah L.
2 Esmaili, on June 8, 2011, that the amended complaint would be based on certain non-public
3 documents (namely, *Exhibit A* to the Amended Complaint (the “Qatalyst Board Presentation”)).
4 Mr. Monteverde specifically requested that Defendants waive confidentiality with respect to the
5 Qatalyst Board Presentation so that it would be easier for counsel to comply with the notice
6 provisions of the Private Securities Litigation Reform Act of 1995 (“PSLRA”), which require
7 Plaintiff to publish a description of the claims asserted in the action. Defendants ultimately rejected
8 Plaintiff’s request, which they were entitled to do. The notion, however, that defendants were
9 unaware of Plaintiff’s intention to file a class action is simply untrue. Moreover, prior to the filing
10 of the administrative motion, and immediately thereafter, Plaintiff did not receive *any* objection to
11 the filing of the administration motion or the Amended Complaint. In fact, on June 10, 2011, as
12 defendants indicate below, counsel for Plaintiff discussed with counsel for defendants a briefing
13 schedule concerning the Amended Complaint and at no time during that conversation did defense
14 counsel raise any objection to the proposed class claims included in the Amended Complaint.

15 In light of the foregoing, Plaintiff believes that the requirements of Rule 15(a)(2) of the
16 *Federal Rules of Civil Procedure* have been satisfied. Defendants’ attempt to interpret the word
17 “amend” to exclude a class claim is inconsistent with numerous prior conversations between the
18 parties and their obligations under Fed. R. Civ. P. 11. “Generally, of course, the plaintiff is the
19 master of the complaint[.]” *Simonian v. Monster Cable Products, Inc.*, 10-cv-05544, 2011 U.S.
20 Dist. LEXIS 60783 (N.D. Cal. June 8, 2011) (citing *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91
21 (2005) (internal quotations omitted). Defendants’ suggestion that Plaintiff should have provided a
22 draft of the complaint to defense counsel for their approval prior to its filing is utterly specious.
23 Indeed, it was not until last evening (and notably well after the Court raised the issue *sua sponte*)
24 that Defendants raised any issue with respect to the filing of an amended Section 14(a) claim that
25 included class allegations. Defendants’ gamesmanship should not be tolerated and the Amended
26 Complaint that was submitted on June 9, 2011, should be accepted by the Court in order to protect
27 Atheros shareholders who were deprived of material information in connection with the Proposed

1 Transaction. Assuming the Court accepts the pleading, Plaintiff will publish the lead plaintiff
2 notice required by the PSLRA, *see* 15 U.S.C. § 78u-4(a)(3)(A)(i), shortly thereafter.

3 **II. Statement of the Atheros Defendants**

4 **A. Procedural History**

5 This action was filed on February 10, 2011. It was pled as an unusual hybrid of (1) a claim
6 under the federal securities laws brought by the plaintiff solely in his individual capacity, combined
7 with (2) a claim for breach of fiduciary duty under Delaware state law brought by the plaintiff as an
8 alleged class representative. On February 15, 2011, plaintiff filed a motion for a preliminary
9 injunction seeking to enjoin the announced merger between defendants Qualcomm Incorporated
10 (“Qualcomm”) and Atheros Communications (“Atheros”). The motion was based solely on the
11 alleged class claim for state law breach of fiduciary duty. Defendants opposed that motion and
12 sought to stay this action in favor of parallel state proceedings in the Delaware Court of Chancery.
13 Following full briefing of that motion and oral argument, this Court issued an order on March 4,
14 2011 staying plaintiff’s class action state law breach of fiduciary duty claims and denying plaintiff’s
15 motion for a preliminary injunction. The court stated that plaintiff’s individual, non-class claim
16 under the federal securities laws could proceed.

17 In March 2011, Plaintiff’s counsel stated to counsel for the Atheros Defendants that if a
18 settlement in the case disclosing the additional information sought was not reached then Plaintiff
19 would amend his federal claim to assert claims on behalf of a class for disclosure violations.

20 On April 11, 2011, defendants Atheros, Willy Shih, Teresa Meng, Craig Barratt, Andrew
21 Rappaport, Dan Artusi, Charles Harris, Marshall Mohr and Christine (the “Atheros Defendants”)
22 made a Rule 12(b) motion to dismiss plaintiff’s individual, non-class federal claim.

23 On April 19, 2011, the parties submitted to the Court a stipulation to defer the initial case
24 management conference. That stipulation stated that plaintiff intended to amend the federal claims
25 alleged in his complaint. It did not say anything about amending to convert the individual claims to
26 class claims. Approximately one month later, on May 16, 2011, plaintiff’s counsel sent an email
27 concerning plaintiff’s intention to file an amended complaint and asking if the defendants would
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1 withdraw their motion to dismiss. Again, this e-mail did not say anything about amending to
2 convert the individual claims to class claims.

3 On May 19, counsel for the Atheros Defendants responded, indicating that they were not
4 willing to withdraw the motion without having an amended complaint on file, and suggesting that
5 plaintiff proceed to amend his complaint, which would moot the Atheros Defendants' motion.
6 Counsel for the Atheros Defendants also indicated that, once they had an opportunity to review the
7 amended pleading, they would be in a position to discuss an appropriate briefing schedule. At no
8 time during any of these discussions did plaintiff's counsel state that such amendment would seek to
9 convert the individual claim to a class claim.

10 On May 24, 2011 the merger between Atheros and Qualcomm closed.

11 On June 6, 2011, three days before plaintiff's opposition to the Atheros Defendants' motion
12 to dismiss was due, counsel for plaintiff sent an email concerning plaintiff's intention to include
13 certain confidential information in the amended complaint. Counsel for the Atheros Defendants had
14 additional conversations on June 7 and June 8 concerning such confidential information and the
15 filing of a motion to seal. At no time during any of these discussions did plaintiff's counsel state
16 that such amendment would seek to convert the individual claim to a class claim.

17 On June 9, 2011, plaintiff filed an amended complaint. The amended complaint alleges that
18 two trivial pieces of information included in a presentation to the Atheros board of directors by its
19 financial advisor were not mentioned in the proxy statement and that, as a result, the proxy
20 statement is false and misleading. The amended complaint now purports to allege this federal
21 securities claim on behalf of a class. The state law claims for breach of fiduciary duty have been
22 dropped. This was the first time counsel for defendants saw the amended complaint.

23 On June 10, 2011, counsel for Atheros Defendants spoke to plaintiff's counsel concerning a
24 briefing schedule for a motion to dismiss the amended complaint filed the day before. The position
25 of plaintiff's counsel was that, because the amended complaint is now brought as a class action, the
26 PSLRA requires plaintiff to give notice to the class, allow the 60 day period to expire, and resolve
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1 any lead plaintiff motions, before the parties can even begin the process of briefing motions to
2 dismiss on the amended complaint.

3 **B. Position of the Atheros Defendants**

4 The Atheros Defendants were aware since at least April 19 that plaintiff was indicating an
5 intent to amend his federal claim, and counsel for the Atheros Defendants stated on May 19 that an
6 amended complaint would moot the Atheros Defendants' motion to dismiss. However, the Atheros
7 Defendants never saw the proposed amended complaint, in draft or final form, until it was filed with
8 the Court on June 9, and had no knowledge of the nature or substance of the amendments plaintiff
9 was contemplating (other than from a generic description contained in plaintiff's draft
10 administrative motion provided on June 8), nor that plaintiff planned to convert his individual
11 federal securities claim to a purported class claim.

12 The Atheros Defendants, having now had the opportunity to review the amended complaint,
13 observe that:

14 1. The amendment of plaintiff's pleading, to allege that the proxy statement was false
15 and misleading for failure to disclose plainly immaterial information concerning a presentation
16 made to the Atheros board by its financial advisor, as well as the allegation that plaintiff is entitled
17 to an award of attorney's fees, is frivolous;

18 2. That pleading should not, under FRCP 11, have been included in a paper filed with
19 the Court, should not survive a motion to dismiss under FRCP 12, and would not have been
20 permitted under FRCP 15 if a motion had been made for leave to amend;

21 3. Plaintiff's original tactic of pleading the federal claim as an individual claim was
22 intended to avoid competition for the Lead Plaintiff and Lead Counsel roles that might have arisen
23 if the federal claim had been pleaded as a class claim (because of the notice that would have been
24 required under those provisions of the PSLRA that relate only to class actions), while preserving
25 plaintiff's ability to threaten an injunction based solely on an individual claim in order to maximize
26 the settlement value of the claim pre-closing;

1 4. Plaintiff now seeks to amend to convert his individual federal claim into a claim for
2 class-wide relief solely because his originally-pleaded class claim under Delaware law has been
3 stayed by this Court, and he hopes through the amendment to maintain the threat of a claim for
4 class-wide damages now that the transaction has closed in order to maximize the settlement value of
5 the claim.

6 The Atheros Defendants submit that plaintiff's maneuvers are an abuse of the class action
7 procedure that should not be tolerated by the Court.

8 At this point, the question for the Court is whether, in the circumstances described above,
9 the amended complaint should be deemed properly filed. If so, then the PSLRA's mandatory
10 notice, Lead Plaintiff and Lead Counsel provisions must now be complied with before the Atheros
11 Defendants can file their motion to dismiss the amended complaint pursuant to FRCP 12(b)(6). If
12 not, the Court could require plaintiff to move for leave to file the amended complaint, pursuant to
13 FRCP 15, in which case the Court would have the opportunity to receive briefing on whether the
14 proposed amendment is futile before the PSLRA provisions would be triggered. We respectfully
15 await the Court's direction as to the process the Court believes is most appropriate and efficient in
16 the circumstances, and will address the deficiencies in the amended pleading either in briefing a
17 motion to dismiss or in opposing plaintiff's motion for leave to amend.

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1 Dated: June 15, 2011

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3 By: /s/Vahn Alexander
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11 *Counsel for Plaintiff and the Proposed Class*

12
13 Dated: June 15, 2011

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18 *Counsel for Defendants Atheros Communications, Inc.,*
19 *Willy C. Shih, Teresa H. Meng, Craig H. Barratt, Andrew S.*
20 *Rappaport, Dan A. Artusi, Charles E. Harris,*
Marshall L. Mohr, Christine King

ATTESTATION OF FILER

Pursuant to General Order No. 45, Section X, Subparagraph B, the undersigned attests that all parties have concurred in the filing of this joint report.

Dated: June 15, 2011

/s/Vahn Alexander
Vahn Alexander

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document *via* the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List.

Dated: June 15, 2011

/s/Vahn Alexander
Vahn Alexander

Mailing Information for a Case 5:11-cv-00640-LHK

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

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Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

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